Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc., for	)	CC Docket No. 97-231
Provision of In-Region, InterLATA	)	
Services in Louisiana	)	
	)	

EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

Joel I. Klein
Assistant Attorney General
Antitrust Division

Lawrence R. Fullerton
Deputy Assistant Attorney General
Antitrust Division

Thomas G. Krattenmaker
Special Counsel for Policy and Regulatory Affairs
Antitrust Division

Philip J. Weiser
Senior Counsel
Antitrust Division

Communications with respect to this document should be addressed to:

Donald J. Russell
Chief

Carl Willner
Luin Fitch
Frank G. Lamancusa
Attorneys
Telecommunications Task Force

W. Robert Majure
Assistant Chief
Economic Regulatory Section

December 10, 1997

Table of Contents

Summary of Evaluation

BellSouth's application to provide in-region interLATA service in Louisiana should be denied.

Applications under section 271 should be granted only when the local markets in a state have been fully and irreversibly opened to competition. This standard seeks to ensure that the barriers to competition that Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and that there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services they will need from the incumbent BOC.

At this time, BellSouth faces no significant competition in local exchange services in Louisiana. Lacking this best evidence that the local market has been opened to competition, the Department cannot conclude that its competition standard is satisfied unless BellSouth shows that significant barriers are not impeding the growth of competition in Louisiana. BellSouth has not done so in this application.

BellSouth has failed to demonstrate that it offers access to unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service, as required by the 1996 Act. Furthermore, BellSouth has failed to demonstrate its ability to provide adequate, nondiscriminatory access to the operations support systems that will be critical to competitors' ability to obtain and use unbundled elements and resold services.

With respect to pricing of BellSouth's interconnection, unbundled network elements and resold services, the Louisiana Public Service Commission has now established permanent prices, and has, at least for the most part, done so in a manner consistent with the Department's competitive standard. However, in a few specific but significant areas, including geographic deaveraging and the pricing of collocation, BellSouth has failed to demonstrate that it offers prices for unbundled network elements in a manner that permits entry and effective competition by efficient competitors.

BellSouth also has failed to measure and report all of the indicators of wholesale performance that are needed to demonstrate that it is currently providing adequate access and interconnection and to ensure that acceptable levels of performance will continue after section 271 authority is granted.

Finally, in light of our determination that BellSouth's local markets have not been fully and irreversibly opened to competition, we conclude that the likely competitive benefits in markets for interLATA services do not justify approving this application. BellSouth's estimates of the magnitude of those benefits rest on unconvincing analytical and empirical assumptions, but more importantly, its analysis fails to give adequate consideration to the more substantial benefits from increased competition in local markets that will be gained by requiring that local markets be opened before allowing interLATA entry.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc., for	)	CC Docket No. 97-231
Provision of In-Region, InterLATA	)	
Services in Louisiana	)	
	)	

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction

The United States Department of Justice ("the Department"), pursuant to section 271(d)(2)(A) of the Telecommunications Act of 1996 ("1996 Act" or "Telecommunications Act"),[1] submits this evaluation of the application filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") on November 6, 1997, to provide in-region, interLATA telecommunications services in the state of Louisiana.

As the Department has previously explained, in-region interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have

---

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.).

been fully and irreversibly opened to competition.[2] This standard seeks to ensure that the barriers to competition that Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and that there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services that they will need from the BOC.

In applying this standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential consumers. To do so, the Department will look first to the extent of actual local competition as the best evidence that local markets are open. The degree to which such entry is broad-based will determine the weight the Department places on it as evidence. If broad-based commercial entry involving all three entry paths has not occurred, the Department will examine competitive conditions to see whether significant barriers continue to impede the growth of competition and whether benchmarks to prevent backsliding have been established. Wherever practical, this examination

---

[2] This open market standard is explained more fully in In re: Application of SBC Communications, Inc. et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121, Evaluation of the United States Department of Justice, at vi-vii and 36-51 (May 16, 1997) ("DOJ Oklahoma Evaluation") and in the Affidavit of Marius Schwartz ("Schwartz Aff."), attached to the instant Evaluation as Ex. 1. Other aspects of the Department's criteria for evaluating applications under section 271 are addressed in the DOJ Oklahoma Evaluation and in In re: Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, CC Docket No. 97-137, Evaluation of the United States Department of Justice (June 25, 1997) ("DOJ Michigan Evaluation").

will focus on the history of actual commercial entry. The experience of competitors seeking to enter a market can provide highly probative evidence concerning barriers to entry, or the absence thereof. However, we do not regard competitors' small market shares, or even the absence of entry, standing alone, as conclusive evidence that a market remains closed to competition, or as a basis for denying an application under section 271. For a variety of reasons, potential competitors may not immediately seek to use all entry paths in all states, even if the barriers to doing so have been removed, and a BOC's entry into interLATA services should not be delayed because of the business strategies of its competitors.

At this time, BellSouth faces no significant competition in local exchange services in Louisiana. Lacking this best evidence that the local market has been opened to competition, the Department cannot conclude that our competition standard is satisfied unless BellSouth proves that significant barriers are not impeding the growth of competition in Louisiana. It has failed to do so in this application. BellSouth asserts that it has met the checklist and public interest requirements of section 271, but that assertion rests in large measure on BellSouth's view as to the nature of those requirements -- a view that is often at odds with the plain language of the statute and with the Commission's prior decisions, as well as the Department's competitive standard. While we believe that BellSouth has made important progress towards fulfilling its responsibilities under the Telecommunications Act to open its local markets to competition, the evidence available in the present application falls well short of demonstrating compliance with several critical prerequisites for approval. In particular:

- BellSouth has failed to demonstrate that it offers access to unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service," as required by the 1996 Act, 47 U.S.C. § 251(c)(3).

- BellSouth has failed to demonstrate its ability to provide adequate, nondiscriminatory access to the operations support systems that will be critical to competitors' ability to obtain and use unbundled elements and resold services. It has failed to measure and report all of the indicators of wholesale performance that are needed to demonstrate that it is currently providing adequate access and interconnection and to ensure that acceptable levels of performance will continue after section 271 authority is granted.

- Although the Louisiana PSC has adopted an appropriate pricing methodology, BellSouth's prices do not always reflect the essential principles of that methodology, failing, for example, to provide for any transition to geographically deaveraged prices for unbundled network elements that would permit efficient competitors to enter the market and compete effectively.

We discuss each of these deficiencies below, after addressing the threshold question of BellSouth's eligibility to apply under either Track A or Track B.

I. BellSouth Can Satisfy Section 271(c)(1) If the Commission Concludes That PCS Providers Are "Competing Providers of Telephone Exchange Service" Within the Meaning of Section 271(c)(1)(A)

Section 271(c)(1) of the 1996 Act requires the BOC seeking in-region, interLATA authority to meet the requirements of either subparagraph (A) ("Track A") or subparagraph (B) ("Track B"). BellSouth contends that this interLATA entry application satisfies Track A, which requires that the BOC be providing access and interconnection to its network for "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers" offering service exclusively or predominantly over their own facilities. 47 U.S.C. § 271(c)(1)(A). To support this claim, BellSouth points to its interconnection agreements with

several Personal Communications Service ("PCS") providers in Louisiana -- PrimeCo, Sprint Spectrum, and MereTel.[3]

In order to accept BellSouth's argument that it has satisfied Track A, the Commission would have to find that these PCS providers are "competing providers of telephone exchange service" within the meaning of section 271(c)(1)(A).[4] Although we examine, from an antitrust perspective, the factual record concerning the manner and extent to which these PCS providers could be said to be "competing" with BellSouth, we defer to the Commission's expert judgment in interpreting its own statute on the legal question of whether this is the correct standard for determining who is a "competing" provider of telephone exchange service.

The 1996 Act specifically provides that cellular services "shall not be considered to be telephone exchange services" for purposes of Track A, 47 U.S.C. § 271(c)(1)(A), but it does not specifically address the status of PCS under Track A. While the Commission has not yet

---

[3] BellSouth's application does not assert that any wireline, facilities-based providers are currently serving residential and business customers in Louisiana. Moreover, BellSouth also does not appear to be entitled to proceed under Track B -- at least under the Commission's standard for assessing whether Track B is available -- as it acknowledges that both AMC and KMC are on the verge of becoming facilities-based competitors that provide service to both business and residential consumers. See Affidavit of Gary M. Wright ¶¶ 35, 41 ("Wright Louisiana Aff."), attached to Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, In re: Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231 (Nov. 6, 1997) ("BellSouth Louisiana Brief") as App. A, Vol. 6, Tab 16. Thus, BellSouth's ability to satisfy section 271(c)(1) turns solely on whether PCS providers can satisfy Track A.

[4] The other prerequisites of Track A are not seriously disputed. It seems clear that these PCS providers are (1) "unaffiliated" with BellSouth, (2) operational, and (3) serve both residential and business subscribers predominantly or exclusively over their own facilities.

determined the effect of this "cellular exclusion" on the status of PCS providers under Track A, this exclusion lends support to the claim that PCS should be considered "competing telephone exchange service" under Track A,[5] following the statutory construction principle of "expressio unius est exclusio alterius."[6]

The Commission has determined that Track A's "competing" requirement can be satisfied by providers that offer an "actual commercial alternative" to the BOC's telephone exchange service,[7] but has not yet addressed whether the statutory requirements of Track A require an assessment of the technical and economic substitutability between competitors' and a BOC's services, and, if so, the degree of substitutability that is needed to establish that a provider is "competing." BellSouth argues that any commercially available provider of telephone exchange

---

[5] We also note that the Commission has previously determined that broadband PCS providers "at a minimum . . . provide 'comparable service' to telephone exchange service" and therefore fall within the definition of "telephone exchange service" provided in 47 U.S.C. § 153(47)(B). In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15,449 ¶ 1013 (1996) ("Local Competition Order").

[6] "The expression of one thing is the exclusion of the other." Black's Law Dictionary, at 521 (5th ed. 1979). See, e.g., Ethyl Corp. v. EPA, 51 F.3d 1053, 1061, 1063 (D.C. Cir. 1995).

[7] In re: Application by SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, Memorandum Opinion and Order, 12 FCC Rcd 8685 ¶ 14 (1997) ("Oklahoma Order"). As the Commission has explained, this does not require that a new entrant have any specific market share to be a "competitor," though the Commission has noted that there may be some de minimis threshold. In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order ¶¶ 77-78 (rel. Aug. 19, 1997) ("Michigan Order").

services can satisfy the Track A facilities-based competitor requirement, even if its services are only substitutable for BellSouth's to a relatively marginal degree. Specifically, BellSouth asserts that Track A's concept of "competing" requires only that a facilities based provider "'actually be in the market' and compete for customers in a geographic locale served by the BOC"[8] and that "the 'price, features, and scope' of a competitor's service need not be comparable to those of the BOC's service."[9] In the alternative, BellSouth argues that the PCS offerings in Louisiana would satisfy a Track A requirement of "economic comparability" to its own wireline service because at least some number of lower-use customers would switch from traditional wireline service to the available PCS offerings.[10]

As the interpretation of section 271(c)(1)(A) falls within the Commission's discretion under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), we respectfully defer to the Commission's judgment on this question. The Commission is entitled to adopt any reasonable construction of this term in interpreting the Track A requirements for section 271 applications. To assist the Commission's decision, however, we offer our assessment that PCS and wireline service are not currently close substitutes in Louisiana from an antitrust

---

[8] BellSouth Louisiana Brief at 14.

[9] Id. at 15.

[10] Id. at 16. Others have argued, however, that Congress did not regard cellular as a substitute for wireline exchange service and thus presumably would not have regarded similar PCS offerings as a substitute either. As the House Commerce Committee explained, it did "not intend for cellular to qualify [under the precursor of Track A], since the Commission has not determined that cellular is a substitute for local telephone service." H. Rep. No. 104-204, at 77.

perspective, but, given the issues of statutory construction presented here, take no position on the merits of whether an antitrust-like substitutability analysis is the most reasonable way to interpret "competing" as used in section 271(c)(1)(A).

From an economic perspective, the substitutability of products (or services) can be assessed on a wide array of evidence, including analyses of the technical characteristics of products and their uses; the manner in which products are marketed; the relative prices of the products; and analyses of the frequency and circumstances under which customers switch from one product to another.[11] As the evidence in the record makes clear, PCS is substantially more expensive than wireline service for the great majority of consumers.[12] In addition, PCS services are priced differently; PCS subscribers pay usage charges for outgoing calls (whereas wireline local services are often flat rated), and for in-coming calls (which are usually free with wireline service). In lieu of these basic economic considerations, we concur with the Commission's decision to refrain from treating PCS as a substitute -- at least in the antitrust sense -- for wireline service.[13]

---

[11] See Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, 4-8 (rev. April 8, 1997) ("Horizontal Merger Guidelines").

[12] See Affidavit of Aniruddha Banerjee on Behalf of BellSouth at 5-7 ("Banerjee Louisiana Aff."), attached to BellSouth Louisiana Brief as App. D, Tab 6; Declaration of Carl Shapiro on Behalf of Sprint at 4-15 ("Shapiro Louisiana Decl."), attached to Petition to Deny of Sprint Communications Company, CC Docket No. 97-231 (Nov. 6, 1997) as App. E.

[13] "[T]he primary obstacle to classifying wireless as a potential substitute for wireline telephony is the per minute charge. ... The services offered by the few operating broadband PCS carriers are currently priced closer to cellular service than to comparable wireline services and therefore it is too early to state that broadband PCS providers' offerings might be perceived as a

From a functional perspective, however, PCS is, as the Commission has previously determined, "comparable" to wireline telephone exchange service.[14] In addition, it is likely that there is a limited degree of substitution between PCS and wireline service among a small proportion of customers. The extent to which these considerations are relevant to and balanced in interpreting the Track A facilities-based competitor requirement are matters that we leave to the Commission.

II. BellSouth Has Failed to Demonstrate That It Is Offering Access and Interconnection That Satisfy the Checklist Requirements

Even if the Commission concludes that BellSouth satisfies the Track A facilities based competitor requirement, it should still deny this application. BellSouth has not demonstrated that it is offering access and interconnection that satisfy critical requirements of the competitive checklist or that it has fully and irreversibly opened Louisiana's markets to competition.

Under Track A, an applicant is required to show that each checklist item is available both as a legal matter and as a practical matter. A mere paper promise to provide a checklist item, or an invitation to negotiate, would not be a sufficient basis for the Commission to conclude that a BOC "is providing" all checklist items. Nor would such paper promises constitute an appropriate basis for the Department to conclude that the market had been fully opened to competition.

---

wireline substitute." Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Second Report, Federal Communications Commission, at 54-55 (rel. March 25, 1997).

[14] See n. 5 supra.

A. BellSouth Has Not Demonstrated That It Is Providing Access to Network Elements in a Manner That Allows Requesting Carriers to Combine Them

Section 251(c)(3) requires incumbent LECs to provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide ... telecommunications service." BellSouth has failed to show that it is offering or providing access to unbundled elements in accordance with this requirement.[15] As we explained in our filing on BellSouth's application in South Carolina, interconnection agreements and an SGAT that fail to state adequately the terms and conditions under which a BOC will provide unbundled elements so that they may be combined do not satisfy section 251(c)(3).[16] In light of the substantial competitive implications of this issue, we believe that a BOC should be required to (1) clearly articulate the manner in which it proposes to offer UNEs so that they may be combined, (2) demonstrate that its proposed method is reasonable and non-discriminatory; and (3) establish that

---

[15] 47 U.S.C. § 271(c)(2)(B)(ii) sets forth the general requirement that the BOC's access and interconnection agreements or statement of terms include "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." In addition, the competitive checklist specifically requires the provision of "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services" (47 U.S.C. § 271(c)(2)(B)(iv)), "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" (47 U.S.C. § 271(c)(2)(B)(v)), "[l]ocal switching unbundled from transport, local loop transmission, or other services" (47 U.S.C. § 271(c)(2)(B)(vi)), and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion" (47 U.S.C. § 271(c)(2)(B)(x)).

[16] In re: Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, Evaluation of the United States Department of Justice, at 16-25 (Nov. 4, 1997) ("DOJ South Carolina Evaluation"), attached to this Evaluation as Ex. 5.

it has the practical ability to process orders and provision unbundled elements that are to be combined by CLECs.[17] In this application, BellSouth again fails to satisfy these requirements.

Given the recent litigation relating to the requirement to provide UNEs in a manner that enables competitors to combine them, the Louisiana Public Service Commission ("LPSC") has yet to make any specific findings that BellSouth is providing unbundled network elements ("UNEs") in a manner that allows requesting carriers to combine them to provide telecommunications services.[18] In its original SGAT and in its interconnection negotiations, prior to the decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) ("Iowa Utilities Board"), BellSouth refused to provide UNEs at cost based prices or to allow them to be used to provide exchange access if the requesting carrier intended to combine them to provide an end user service that competed with a BellSouth service. Both in its initial decision, as well as its decision on rehearing

---

[17] Providing access to UNEs in a manner that will enable CLECs to combine them will also enable CLECs to use unbundled local switching (ULS), a checklist item required by section 271(c)(2)(B)(vi). See DOJ Michigan Evaluation at 16-21. Partially due to the inability of CLECs to obtain UNEs for use in combination, there has only been minimal experience with ULS in BellSouth's region, and there are serious questions about whether or not BellSouth is "providing" this checklist item. See Florida Public Service Commission, In re: Consideration of BellSouth Telecommunication, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, Docket No. 960786-TL, Order No. PSC-97-1459-FOF-TL, Final Order on BellSouth Telecommunication, Inc.'s Petition Filed Pursuant to Section 271(c) of the Telecommunications Act of 1996 and Proposed Agency Action Order on Statement of Generally Available Terms and Conditions, at 108-111 (Nov. 19, 1997) ("Florida PSC Order"), attached to AT&T Comments as App. Vol. IV, Attach. 56 (concluding that BellSouth has not satisfied this checklist obligation).

[18] The proceedings involving the LPSC's consideration of issues relating to unbundled network elements are similar in many respects to the proceedings in South Carolina, discussed in DOJ South Carolina Evaluation at 17-19.

(that vacated section 51.315(b) of the Commission's rules), Iowa Utilities Board v. FCC, No. 96-3321, Order On Petitions For Rehearing, 1997 WL 658718, at *2 (8th Cir. Oct. 14, 1997), the Eighth Circuit made clear that entrants were entitled to purchase UNEs and use them in combination to provide service. In fact, the Eighth Circuit justified its ruling that the incumbents need not combine UNEs for competitors on the ground that "the fact that the incumbent LECs object to this rule [on combining elements for CLECs] indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." Iowa Utilities Board, 120 F.3d at 813.

BellSouth did modify its Louisiana SGAT in light of this decision -- to include a provision stating that BellSouth must allow requesting carriers to gain access to network elements in order to combine them[19] -- but it has yet to develop specific proposals as to how this might be accomplished. Accordingly, interested parties have not had an opportunity to comment on any such proposals and the LPSC made no findings concerning any such specific proposal.[20]

---

[19] See Louisiana Public Service Commission, In re: Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. U-22252, Order U-22252-A, at 16 (rel. Sept. 5, 1997) ("Louisiana PSC Order"), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 136.

[20] There are, in fact, proceedings pending at the LPSC on this question. On October 29, BellSouth requested that the LPSC amend its regulations to include provisions similar to those contained in the South Carolina SGAT, providing for requesting carriers to obtain such access in collocation arrangements. Comments of BellSouth Telecommunications, Inc. on Eighth Circuit Opinion in Iowa Utilities Board, Docket No. U-20883, at 8-9 (Oct. 29, 1997), attached to this Evaluation as Ex. 6. In contrast, AT&T filed comments requesting that the LPSC adopt requirements that requesting carriers be permitted direct access to unbundled elements and be furnished with the technical information necessary for recombining the ILEC network elements.

Similarly, the LPSC has not considered the soundness of what, if any, charges BellSouth intends to collect from CLECs as part of making UNEs available so that they may be combined.

After the Eighth Circuit ruled, the LPSC directed BellSouth to add the following provision to its SGAT:

> Combining Network Elements. A requesting carrier is entitled to gain access to all of the unbundled elements that when combined by the requesting carrier are sufficient to enable the requesting carrier to provide telecommunication service. Requesting carriers will combine the unbundled network elements themselves.[21]

In essence, this provision suffers from a similar lack of specificity to the provision that we found unsatisfactory in our South Carolina filing.[22] Accordingly, the Department finds BellSouth's Louisiana SGAT provision on combining UNEs to be legally insufficient as well.[23]

AT&T's Comments and Proposed Amendments to the LPSC's Regulations for Competition in the Local Telecommunications Market Based on the Iowa Utilities Board Decision, Docket No. U-20883, at 3 (Oct. 29, 1997), attached to this Evaluation as Ex. 7. As of this filing, the LPSC has not yet acted on either of these requests, and, to our knowledge, has not announced whether it will make further determinations on the methods by which BellSouth must allow requesting carriers to gain access to UNEs in order to recombine them.

[21] Statement of Generally Available Terms and Conditions for Interconnection, Unbundling and Resale Provided by BellSouth Telecommunications, Inc. in the State of Louisiana as modified by Louisiana Public Service Commission, Order Nos. U-22252-A and U-22022/22093-A, attached to BellSouth Louisiana Brief as App. A, Vol. V, Tab 14.

[22] DOJ South Carolina Evaluation at 20-23.

[23] As we have explained, a commitment to provide UNEs in accordance with section 251(c)(3) must include: (1) the terms and conditions under which a BOC will permit access to UNEs; (2) the functionalities that a BOC is committed to provide in order to enable CLECs to combine such elements in an effective manner; and (3) the technical specifications that CLECs will need to order UNEs so that they can be recombined. See DOJ South Carolina Evaluation at 13, 16-23.

BellSouth states that it is open to negotiating at least some of the issues concerning the combining of UNEs.[24] This is insufficient for a basic reason: outlining an undeveloped plan for enabling competitors to combine elements and offering to negotiate terms and conditions on a case-by-case basis do not commit BellSouth to *any* procedure -- let alone one that would be sufficient to satisfy section 251(c)(3) and the checklist standard.

While there is much that is unclear concerning the manner in which BellSouth proposes to provide unbundled elements, it does appear clear that BellSouth believes it may require CLECs to lease collocation space and deploy their own equipment for the purpose of combining unbundled loops, local switching, and other unbundled elements. At present, BellSouth has suggested that it may be willing to discuss other approaches, but has not made any binding commitment to enable a CLEC to combine UNEs in any other fashion. Thus, on the present record, given BellSouth's insistence on physical collocation -- or an unspecified solution to be devised later -- we cannot conclude that BellSouth is providing "just, reasonable, and nondiscriminatory" access to unbundled elements, as required by the checklist and section 251(c)(3).

CLECs have provided substantial evidence in this proceeding indicating that a collocation requirement would dramatically and unnecessarily increase the obstacles to combining elements,

---

[24] For example, BellSouth, in Varner's affidavit, states that "[a]dditional services desired by CLECs to assist in their combining or operating BellSouth unbundled network elements are available as negotiated," and "[a]dditional software modifications requested by CLECs for new features or services currently not available and additional services desired by CLECs to assist in their combining or operating BellSouth unbundled network elements may be obtained through the [Bona Fide Request] process." Affidavit of Alphonso J. Varner on Behalf of BellSouth ¶¶ 66, 67 ("Varner Louisiana Aff."), attached to BellSouth Louisiana Brief as App. A, Vol. V, Tab 14.

would decrease the quality of the service that new entrants are able to provide compared to the incumbent (increasing the risk of service outages), and would severely limit the number of customers that new entrants would be able to serve for the foreseeable future. Given the lack of specificity in the SGAT and the absence of any consideration by the LPSC of these issues, we are not in a position to assess these concerns. We do note that, given the presence of alternative approaches for permitting the recombination of network elements, two of which are outlined in an affidavit submitted by AT&T,[25] any determination of which approaches are reasonable and non-discriminatory requires an assessment of the available alternatives. Neither BellSouth, nor the LPSC, has undertaken a serious examination of this question. Rather, BellSouth has merely asserted, but not demonstrated, that a requirement of collocation arrangements should be considered reasonable and non-discriminatory. In light of the cumbersomeness of this approach, the threat of service outages and the competitive disadvantages that such a requirement could impose on CLECs, we cannot conclude -- at least on the present record -- that BellSouth's offering of collocation satisfies its obligation under section 251(c)(3).

In order to show that it is "providing" unbundled elements, a BOC must also demonstrate that it has the practical ability to provide network elements in a manner that permits them to be combined. The BOCs' current networks were not designed to provide unbundled elements to others and it should not be assumed that they necessarily possess the capabilities to do so. To

---

[25] Affidavit of Robert V. Falcone and Michael E. Lesher on behalf of AT&T Corp. ¶¶ 97-122 ("Falcone and Lesher Louisiana Aff."), attached to Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for Louisiana, CC Docket No. 97-231 (Nov. 25, 1997) as App. Vol. V, Tab E.

date, there has been no actual experience with the provision of network elements by BellSouth to CLECs attempting to combine them and the limited testing thus far does not appear to have tested the particular capabilities at issue here. In the absence of actual provisioning or satisfactory evidence of testing, BellSouth has not demonstrated that it has the practical ability to provide unbundled elements in a manner that will permit CLECs to combine them to provide telecommunications service.

The resolution of the issues relating the combining of elements will be very important to promoting efficient competitive entry. In certain cases, the most economically efficient means for CLECs to serve a large segment of customers in the foreseeable future may be through the use of combinations of unbundled elements, whether a CLEC uses only combinations of elements purchased from incumbent LECs, or uses such elements in conjunction with network elements of its own. If appropriate means can be found to ensure that elements are provided in a manner that allows CLECs to combine them without unnecessary obstacles and overly cumbersome procedures, alternative providers of local services may be able to serve many consumers using unbundled elements. Conversely, if unbundled elements are provided in a manner that requires CLECs to incur large costs to combine them, many customers -- especially residential ones -- may lack a facilities-based alternative to the BOC for a considerably longer period of time.

B. BellSouth's Wholesale Support Processes Are Deficient

Efficient and effective wholesale support processes–the manual and electronic processes, including access to OSS functions, that provide competing carriers with meaningful access to

resale services, unbundled elements, and other items required by section 251 and the checklist of section 271–are critical to opening local markets to meaningful competition. As we made clear in our South Carolina evaluation and reaffirm here, BellSouth has not yet demonstrated that its wholesale support processes are sufficient to meet the checklist and to ensure that its local markets are fully and irreversibly open to competition.[26]

The Department's analysis of wholesale support processes flows, not simply from statutory requirements,[27] but most fundamentally from our recognition that these processes are critical to facilitating competition. Inadequate processes will prevent competitors from providing the level of quality and timeliness that customers rightly expect from telecommunications providers, and faced with such shortcomings, customers will hold the *competing carrier*–not the delinquent incumbent–responsible for the failure.[28] Because of this risk, competitors are unlikely to undertake entry on a significant scale when incumbents are offering only a paper commitment to provide the necessary support processes at some future point rather than adequate and reliable support processes. Accordingly, to have meaningful competition and "to ensure that a new entrant's decision to enter the local exchange market in a particular state is based on the new entrant's business considerations, rather than the availability or unavailability of particular OSS

---

[26] DOJ South Carolina Evaluation at 25-31; Appendix A to DOJ South Carolina Evaluation ("DOJ South Carolina App. A"), attached to this Evaluation as Ex. 4.

[27] Local Competition Order ¶¶ 516-517, 520-525; see also Michigan Order ¶¶ 130-32.

[28] Consequently, competing carriers may tend to delay ramping up their operations until they gain a level of confidence in the incumbent's systems.

functions," Michigan Order ¶ 133, it is essential that the necessary wholesale support processes be in place, available on a non-discriminatory basis, and scalable to meet reasonably foreseeable future demand.

BellSouth places great weight upon the findings of the LPSC that its OSS satisfy the checklist. We find the LPSC's determination to be unpersuasive for several reasons. First, the LPSC's determination was not based upon the Commission's approach for assessing checklist compliance.[29] Second, the LPSC did not articulate the analysis it performed in assessing OSS compliance, so that it is difficult to ascertain the basis for its conclusion on OSS or its reasons for rejecting the recommended decision of the Chief Administrative Law Judge (ALJ) that did discuss OSS issues at length and found significant deficiencies.[30] Third, it appears that the LPSC's

---

[29] During its open session the day after the Michigan Order was released, just before reaching its decision on the SGAT, the LPSC rejected a motion by Commissioner Field to ask BellSouth for an additional sixty days to review the SGAT to, inter alia, "allow [the LPSC] to analyze fully the implications of the [Michigan Order] for BellSouth's SGAT." Partial Minutes of August 20, 1997, Open Session of the LPSC Held in Baton Rouge, Louisiana, at 2-4 ("LPSC Partial Minutes"), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 135. Instead, the LPSC proceeded to immediately approve the SGAT.

[30] Recommendation, Docket No. U-22252, at 24-27 (Aug. 14, 1997) ("ALJ Recommendation"), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 131. The LPSC staff also recommended against finding compliance on OSS. LPSC Staff 271 Recommendation, Docket No. U-22252, at 3 (Aug. 15, 1997) ("LPSC Staff Recommendation"), attached to BellSouth Louisiana Brief as App. C-1, Vol. 13, Tab 133). After observing that the issue was "hotly contested" and that the LPSC had conducted a technical conference and propounded 115 data requests, the LPSC simply stated: "Following careful consideration and analysis, the Commission concludes that the Operations Support Systems do in fact work and operate to allow potential competitors full non-discriminatory access to the BellSouth system." Louisiana Public Service Commission Order, Docket No. U-22252, Order U-22252-A, at 15 (rel. Sept. 5, 1997).

recommendation was premised, at least in large part, on a technical demonstration held on August 13[31] as opposed to a more thorough assessment of performance parity and operational readiness through internal testing evidence, carrier-to-carrier testing, and performance indicators reflective of actual use. Finally, BellSouth's OSS are operated on a regional, rather than a state-by-state, basis, and other state commissions in BellSouth's region have concluded that the same systems approved by the LPSC were insufficient.[32]

Putting aside BellSouth's legal arguments and efforts to explain away the concerns articulated in the Department's South Carolina filing, it remains clear that BellSouth has failed to satisfy the Department's three essential requirements for an acceptable wholesale support system, as we made clear in our South Carolina Evaluation and reaffirm here.[33] First, BellSouth has not instituted *performance measures* that will enable it to demonstrate -- through objective criteria -- that it can provide wholesale performance at parity with its own retail performance where such a comparison can be made, and a meaningful opportunity to compete, where no retail counterpart is available. As we have stressed, proper performance measurement is an essential aspect of

---

[31] The LPSC comments and the record of the state proceeding suggest that the majority of the commissioners based their decision on this short technical demonstration. See Comments of the Louisiana Public Service Commission, CC Docket No. 97-231, at 2, 28 (Nov. 24, 1997); see also LPSC Partial Minutes at 2, 4-5, 7-8.

[32] The Florida Public Service Commission, for example, recently issued an order rejecting BellSouth's SGAT, finding that BellSouth OSS do not meet the statutory requirements and highlighting many concerns similar to those that we identified in our evaluation of BellSouth's South Carolina application. Florida PSC Order.

[33] DOJ South Carolina Evaluation at 25-31; BellSouth South Carolina App. A.

providing effective support systems, and although BellSouth has taken important steps in this regard, it has yet to institute the necessary range of measures to demonstrate that it has provided satisfactory support processes.[34] Second, as explained in our South Carolina filing, BellSouth has failed to implement support systems that provide CLECs with *access to the basic functionalities at parity with its own systems*. BellSouth has attempted to explain away a number of the Department's concerns, but, in the short period of time since its initial filing, it has failed to make the changes necessary to provide such access.[35] Finally, the Department remains unconvinced that the important BellSouth systems have been *"stress tested"* to establish their operational readiness -- i.e., that the systems can be relied on when used at foreseeable levels of demand.

III. The Louisiana Market Is Not Fully and Irreversibly Open to Competition

The 1996 Act requires the Commission to consult with the Attorney General on all applications under section 271, and authorizes the Attorney General to provide an evaluation of such applications "using any standard the Attorney General considers appropriate."[36] The 1996 Act does not limit the Department's evaluation to any of the specific findings that the Commission is required to make, under section 271(d)(3), before approving an application. Indeed, it does not

---

[34] Affidavit of Michael J. Friduss on Behalf of the U. S. Department of Justice ¶¶ 18-24, 45-73 ("Friduss South Carolina Aff."), attached to this Evaluation as Ex. 3.

[35] For example, flow-through continues to be a major problem, with extremely low rates compared to BellSouth's retail performance. See Affidavit of William N. Stacy, Checklist Compliance (Operations Support Systems) Ex. WNS-41, attached to BellSouth Louisiana Brief as App. A, Vol. 4a, Tab 12.

[36] 47 U.S.C. § 271(d)(2)(A).

limit the evaluation to those findings, collectively, though of course the evaluation may be relevant to any or all of those findings. In any event, the Commission is required to accord "substantial weight" to the Department's evaluation. 47 U.S.C. § 271(d)(2)(A).

As we have explained previously, significant commercial entry can give rise to the inference that a market has been opened to competition.[37] At this time, however, BellSouth faces no significant competition in local exchange services in Louisiana.[38] Thus, despite the apparent interest in entering Louisiana by a significant number of competitors, there is no reason to presume that the market is fully and irreversibly open to competition. Therefore, we must examine competitive conditions more carefully to see whether any significant barriers continue to impede the growth of competition in Louisiana.

A. BellSouth Has Not Demonstrated That All of Its Current or Future Prices for Unbundled Elements and Resale of Certain Retail Services Will Permit Efficient Entry or Effective Competition

1. Pricing of Unbundled Elements

Competition through the use of unbundled network elements will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices. In evaluating pricing arrangements as part of its competitive assessment, the Department will ask whether a BOC has demonstrated that its current prices are, and future prices will be, supported by a reasoned application of a procompetitive pricing methodology.

---

[37] See DOJ Oklahoma Evaluation at 43-44; DOJ Michigan Evaluation at 30.

[38] The competitive situation in Louisiana is reviewed in more detail in Appendix B to this Evaluation.